89-294

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

ELIJAH GORDON; IDA F. BUSH,

Petitioners,

v.

DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

ELIJAH GORDON
Attorney In Pro Se

2037 West 93rd Street
Los Angeles, California 90047
(213) 779-8274

IDA F. BUSH
Attorney In Pro Se

1661 East 123rd Street
Los Angeles, California 90059
(213) 635-3067

Petitioners

30 pp

QUESTIONS PRESENTED

I. Did the Ninth Circuit Court of Appeals deny Petitioners due process of law by speculatively framing the issues of Petitioners' case and thereupon rendering a speculative judgment?

II. Did the Ninth Circuit Court of Appeal err in failing to resolve the federal law procedural question of whether a federal district court is mandated to enter a default judgment when no answer has been timely filed and the time within which to answer a complaint cannot be waived by the parties?

III. Did the Ninth Circuit Court of Appeal err in failing to set aside the judgment of the United States District Court, Central District when it appears that the weight of the evidence wholly inconsistent with the jury verdict?

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The Petitioners, Elijah Gordon and Ida F. Bush, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Ninth Circuit Court of Appeals in Elijah Gordon and Ida F. Bush v. Department of Water and Power of the City of Los Angeles, case number CV 88-5786, D.C. Nos. CV-86-2775-JGD and CV-87-3468-JGD.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals panel is reprinted in the Appendix hereto, pages A1 - A10.

JURISDICTION

The decision of the Ninth Circuit Court of Appeals was decided on May 23, 1989. No petition for rehearing was made to the Ninth Circuit Court of Appeals. Alternatively, Petitioners filed this petition for writ of certiorari. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS

Amendment XIV of the United States Constitution is involved in the instant case.

STATEMENT OF THE CASE

Petitioners Elijah Gordon and Ida F. Bush are and have been Black employees of the Los Angeles Department of Water and Power since 1969 and 1979, respectively. Petitioners are "D-level" Reprographic operators of "L.A. DWP" and each aspired to the "C-level" position within the agency. In April, 1985 a "C-level" position became available. Appointment to the position was to be based upon seniority and performance on a department written and oral examination. The Department of Water and Power did not publish the position and did not interview candidates among a pool of senior and eligible employees. Instead, the agency filled the position by appointing a Hispanic female, Ms. Hortense Medina, who had been employed by the agency for only four (4) months and had no previous

education, experience or training required by the job position.

At the trial court, the jury entered judgment in favor of defendant/respondent "L.A. DWP" though the jury indicated in its "Statement From the Jury" that "D-level" employees were used to perform "C-level" jobs without commensurate compensation for extended periods of time, there were inconsistencies in promotion procedures, examinations for job applicants did not accurately measure job performance and were administered by persons who had no working knowledge of the equipment to be used by the job applicant in performing his or her duties.

Plaintiffs/Petitioners appealed the jury verdict on the basis that the weight of the evidence was wholly inconsistent with the evidence and also raised the issue as to whether

default judgment should have entered against defendant/respondent when it failed to timely file its answer in violation of Local Rule 7.3.2.

The Ninth Circuit Court of Appeals upheld the judgment below. In its opinion the Court of Appeals extrapolated issues from petitioners appeals brief and thereupon rendered an opinion. It also did not resolve important federal procedural law questions as to whether the period set for filing an answer can be waived by the parties and if not, whether the court must enter default judgment, and whether the Ninth Circuit Court of Appeal had jurisdiction.

THE REASONS FOR GRANTING THE WRIT

It is the petitioners contention that they were denied fundamental due process because the Ninth Circuit Court of Appeals formulated the issues it assumed was being presented by petitioners/appellants in their appeal brief and based on bare assumption it rendered a judgment. This is evidenced by the court's opinion wherein it intimated that it (the court) was not clear as to the issues being presented. The court chose to rely on respondent/appellee's brief to determine the issues being presented rather than request that appellants file a supplemental brief. The result is that the court's opinion is speculatively and arbitrary. It is a matter of fundamental due process that a litigant be afforded a full and fair opportunity to be heard so as to avoid capricious and arbitrary review

by the state. Amendment IV of the United States Constitution. If the court was unsure of the issues before it, it could have sought clarification by further oral argument or a supplemental brief rather than risk an arbitrary review on appeal. As the court well noted, it cannot try the case for petitioners. Yet here, it framed the issues of petitioners case. The result is that the Court erroneously concluded that petitioners appeal did not challenge the sufficiency of the evidence, a subject which is a proper one for appeal. Appellants did challenge the sufficiency of the evidence on appeal in that appellants argued strongly that the jury note and other evidence presented at trial unquestionably challenged the promotional and hiring procedures of Los Angeles Department of Water and Power. The jury's

findings of biased and incompetent hiring procedure did not comport with its verdict in favor of appellees.

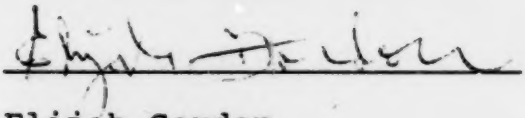
A fundamental question of federal procedural law was left unresolved by The Ninth Circuit Court of Appeal. On appeal, the petitioners herein challenged the ability of a defendant in a civil case to file a late answer where the United States District Court Local Rule 7.3.2 specifically requires that an answer be timely filed. The rule does not provide that parties to a federal civil action may waive or stipulate to a late filing. This is an important question of federal procedural law. The court avoided deciding this question by stating that since petitioners did not file for default, it would not decide the question. The court's reasoning is clearly in error because if the late filing of the answer could

not be waived, the clerk of the court must still enter a default judgment against appellee retrospectively as of one day after the due date of the answer under the doctrine of relation back. Federal Rule 55(a); Shapiro , Bernstein & Co. v. Continental Record Co., C.A. 2d, (1967) 386 F. 2d 426; American Auto Ins. Co. v. U.S. for Use of Luce, C.A. 1st, 1959, 269 F. 406. Appellants now ask that this fundamental procedural question be decided by this court. By analogy, if a timely notice of appeal cannot be waived it is not unreasonable in interpreting Local Rule 7.3.2 that timely filing of an answer cannot be waived.

CONCLUSION

For these various reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



Elijah Gordon

Petitioner/ Attorney In

Pro Se

APPENDIX

Opinion and Order of
United States Court
of Appeals for the Ninth Circuit

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 86-5786
D.C. Nos. CV-86-2775 JGD
CV-87-3468 JGD

ELIJAH GORDON; IDA F. BUSH,

Plaintiffs-Appellant,

versus

DEPARTMENT OF WATER AND POWER
OF THE CITY OF LOS ANGELES,

Defendant-Appellee.

Appeal from the United States District Courtt for the Central District of California John G. Davies, District Judge, Presiding

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Before: SCHRODER, FLETCHER, AND TROTT, Circuit Judges

Elijah Gordon and Ida F. Bush appeal from adverse judgments following trial in two consolidated actions involving Title VII and Section 1981 claims. We affirm.

FACTS

Appellants are black "D-level employees of the Los Angeles Department of Water and Power ("DWP"). The gravamen of appellant's complaint was the promotion of an Hispanic woman form a D-level to a vacant C-level position without giving to the plaintiffs notice of the opening and the opportunity to interview for the position. Appellants assert that they had seniority over the successful applicant. Their first action alleged causes of action under 42 U.S.C. Section 1981, Title VII, and pendent state law claims based on contract. Their second action alleged a cause of action under 42 U.S.C. Section 2000e-3 for retaliation aimed at them because of the original filing. The two actions were consolidated for trial. The Section 1981 count was tried before a jury and the Title VII

counts before the court. Both the jury and the court held against appellants.

Appellants were represented by counsel below, but bring this appeal pro se.1 Their briefs suffer from a lack of understanding of the function of appellate review. Appellants' argument consists of little more than the bare assertion that they should not have lost their case. We may not, however, retry their case for them. DWP in is Answering Brief has attempted to five some definition to the appeal by identifying specific issues which, in their opinion, appellants may be presenting. Appellants do no appear to agree completely with DWP's version of the issues, but have not used their Reply Brief to clarify every claim plausibly raised by appellants' briefs.

DISCUSSION

I. Notice of Appeal

Plaintiffs filed two separate lawsuits. No. 86-2775 alleged claims under 42 U.S.C. Section 1981 and Title VII. (A pendent state law claims was also included but subsequently dismissed for the filing of 86-2775, in violation of Section 704(a) of Title VII. The cases were consolidated for trial. The Section 1981 claim in 86-2775 was tried to a jury, the Title VII claims in 86-2775 and 87-3468 to the court. The jury returned a verdict in favor of defendants on February 5, 1988. Judgment was entered on February 11, 1988. The court decided in favor of the defendants on the Title VII counts on March 2, 1988, and entered judgment on March 10, 1988.

The notice of appeal is form the judgment on the verdict entered in case number 86-2775 on February 11, 1988. The notice of appeal was filed on March 1, 1988. Thus, the notice of appeal technically does not include the judgment on either Title VII claims. Defendants are willing to deem the notice of appeal inclusive of all causes of action in both cases.

Whether the requirement of timely notice of appeal may be waived by the appellee is a novel and difficult question. See Torres v. Oakland Scavenger Co., 108 S. Ct. 2405, 2408 (1988)(notice of appeal is jurisdictional; court of appeal must distinguish between imperfect but substantial compliance and waiving the requirements altogether). Probably little harm could result from construing appellee's waiver and filing of a responsive brief as a

sufficient compliance with the notice of appeal requirements to give us jurisdiction over appellants' appeal of the dismissal of their Title VII claims. We see no danger of appellees participating in a flooding of the courts of appeals by waiving defects in notices of appeal. However, since we conclude that plaintiffs' appeal of the dismissal of the Title VII claims would fail on the merits in any event, we need not decide whether the appeal of the Title VII aspect of the case was or was not perfected.

II. Issues Related to Default Judgment

Appellants argue that DWP's late filing of an answer required the district court to enter default judgment in their favor. Fed. R. Civ. P. 12(a) requires service of an answer within 20 days after service of the complaint. Rule 55 provides for entry

of a default judgment if a defendant fails to answer; however, if the defaulting party makes an appearance, the court and not the clerk must enter the default, and only after notice and hearing. Rule 55(b)(1) and (2). Whether to grant a motion for default is within the discretion of the district court. Eitel v. McCool, 782 F. 2d 1470, 1471 (9th Cir. 1986).

Plaintiffs' counsel agreed to an extended filing date. Plaintiffs nevertheless assert that, under Local Rule 7.3.2 of the Central District of California, only the court could approve a late filing date. We do not reach the merits of this claims since the plaintiffs never moved for default below. As a general rule, an issue not presented to the district court cannot be raised for the first time on appeal. See, e.g., Gonzales v. Parks, 830 F. 2d 1033, 1037 (9th Cir. 1987).

As the discretion given to district courts in granting motions for default judgments attests, the filing of an answer is not a jurisdictional prerequisite and therefore timeliness of the answer need not be considered by this court.

III. Evidentiary Claims

DWP suggests that appellants' appeal can be construed to include a generalized challenge to the sufficiency of the evidence. We tend to disagree. No challenge to the evidence is mentioned in appellants' statement of issues.2 In their Reply Brief, they assert that this court "has the power to reverse decisions made by the district court after hearing and reviewing the evidence." Although appellants discuss in a general way the evidence presented below, they do not argue specifically that any finding of fact was incorrect

or that there was a failure of defendant's proof to rebut plaintiffs' prima facie case.

Although pro se briefs and pleadings are to be interpreted liberally, something more than what appellants have done here is required to perfect an appeal based on sufficiency of the evidence or allegedly erroneous findings of fact.

Even were we to agree with DWP that appellants' brief raises evidentiary issues, their failure to provide a transcript of all relevant evidence, as required by Fed. R. App. 10(b)(2), makes review of their evidentiary claims impossible. The appropriate procedure in such a case is for our court to decline to consider appellants' evidentiary arguments. See Jensen v. United States, 326 F. 2d 891, 893 (9th Cir. 1964).

IV. Consolidation of the Actions

Appellants allege in their statement of issues that "the evidence for the discrimination complaint should not have been included with evidence for the retaliation complaint and given to the jury." Appellants assert that exhibits pertaining to both causes of action were compiled together, and allege that this was done with the intent to confuse the jury. The only evidence of confusion they allege is a note from the jury, noting certain "extraordinary and unusual" circumstances in DWP's promotion process. The jury had four criticisms of DWP which it wished to express. Appellants argue that two of them, concerning DWP's testing and scoring procedures, were relevant only to their court-tried retaliation complaint. This, appellants argue, shows DWP improperly diverted the

jury's attention from their discrimination complaint.

Appellants do not indicate whether they objected to this evidence going to the jury. At any rate, it is impossible to see how the jury note shows that consolidation prejudiced their case. The jury apparently found itself constrained to grant a verdict in favor of DWP, but wished to make a statement sympathetic to the plaintiffs. To the extent appellants challenge the consolidation itself, district courts have the power to consolidate actions involving common questions of law or fact. Fed. R. Civ. P. 42(a). Exercise of this power is reviewed for abuse of discretion. Cf. In re Adams Apple, Inc., 829 F. 2d 1484, 1487 (9th Cir. 1987). We find no abuse here.

V. Jury Bias

Appellants argue on appeal that the "the jury panel which consisted of four whites and one Hispanic was biased in its decision-making." This claim is facially inconsistent with their argument, in the same paragraph, that the jury's note "is good indication of defendant's liability to plaintiffs." Racial bias is not shown merely by showing that members of races other than plaintiffs' comprised a majority on the jury. See Hirst vs. Gertzen, 676 F. 2d 1252, 1260 (9th Cir. 1982). Because appellants fail to adduce any other evidence whatsoever of racial bias, this claim too must fail.

WE AFFIRM.

Dated: May 23, 1989

Signed:/s/_____

United States

District Judge

NOTES

[1] A motions panel of this court refused to appoint counsel because appellants are not proceeding in forma pauperis.

[2] Appellants' brief purports to incorporate a "Civil Appeals Docketing Statement" in the statement of issues. This "Statement" was never received by DWP, nor does it appear in the Excerpt of Record or Clerk's Record. Thus, any claims presented solely in that "Statement" must be deemed abandoned.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE,

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is: 222 So. Harbor Boulevard, 9th Floor Anaheim, California 92805.

On August 18, 1989, I served the foregoing document described as PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

PROOF OF SERVICE

James K. Hahn, City Attorney
Edward C. Farrell, Chief Assistant City Attorney for Water and Power
Terso R. Rosales, Asst. City Attorney
(3 copies)

P.O. Box 111
111 North Hope Street
Los Angeles, California 90051

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

By federal express mail I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Anaheim, California. Executed on August 18, 1989 at Anaheim, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Signed: Wilma R. Shanks

Wilma R. Shanks